

B. Miller



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Norfolk Dredging Company--Reconsideration
File: B-236259.2
Date: October 31, 1989

DIGEST

When on its face a protest appears to be untimely, a protester who is in possession of facts that would establish its timeliness, but who does not initially present those facts to the General Accounting Office, runs the risk of dismissal and of refusal to reconsider the matter when the protester ultimately presents all the facts.

DECISION

Norfolk Dredging Company (NDC) requests reconsideration of our decision Norfolk Dredging Co., B-236259, Aug. 11, 1989, 89-2 CPD ¶ 134, in which we dismissed the protest concerning invitation for bids (IFB) No. DACW65-89-B-0024, issued by the U.S. Army Corps of Engineers for maintenance dredging of the Norfolk Harbor Channel, Elizabeth River and Hampton Roads, Virginia.

We deny the request for reconsideration.

The Army issued the IFB on March 27, 1989. By letter dated April 7, NDC filed a protest with the Army challenging its decision to issue the solicitation as a small business set-aside. Despite NDC's protest, the Army proceeded with the procurement and opened bids on April 27. On July 10, the Army issued a letter denying the agency-level protest, which NDC received on July 14. By letter received in our Office on July 21, NDC protested issuance of the IFB as a small business set-aside. Since NDC's protest was received more than 10 working days after the April 27 bid opening, which constituted initial adverse action on the agency-level protest, we dismissed the protest as untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1989); York Int'l Corp., B-234895, Apr. 24, 1989, 89-1 CPD ¶ 404.

046952/139892

In its request for reconsideration, NDC for the first time contends that after submitting its agency-level protest, the contracting officer informed NDC that no contract award would be made until NDC's agency-level protest was resolved.^{1/} Because of this alleged assurance by the contracting officer, NDC maintains that the July 10 agency letter denying the protest rather than the April 27 bid opening constituted the initial adverse agency action. Accordingly, NDC now contends that its protest to our Office was timely since it was filed within 10 working days of receiving the agency's July 10 letter of denial.

Under our Regulations, a request for reconsideration must contain a detailed statement of the factual and legal grounds upon which a reversal or modification of the initial decision is warranted as well as specify any errors of law made or information not previously considered by this Office in rendering its prior decision. 4 C.F.R. § 21.12(a). Information not previously considered means information that was not available to the protester when the initial protest was filed. Any other interpretation would permit a protester to present information in a piecemeal fashion and possibly disrupt the procurement of goods and services indefinitely. Global Crane Inst.--Request for Reconsideration, B-218120.2, May 28, 1985, 85-1 CPD ¶ 606.

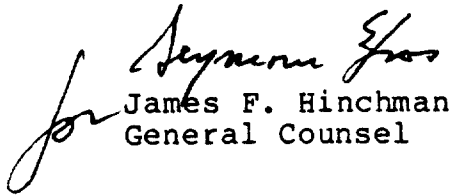
Here, despite its claimed reliance on the contracting officer's alleged assurance that no action would be taken on the procurement until the agency-level protest was resolved, NDC failed to provide our Office with this information when it filed its initial protest in July. Accordingly, on its face the protest was clearly untimely since it was filed more than 10 working days after bid opening. Where, as here, a protest on its face appears to be untimely, a protester who is in possession of facts that would establish its timeliness, but who does not initially provide those facts to our Office, runs the risk of dismissal and of our refusal to reconsider the matter when the protester ultimately presents them. World-Wide Sec. Serv., Inc.--Reconsideration, B-225270.2, Mar. 17, 1987, 87-1 CPD ¶ 294. Thus, NDC cannot introduce for the first time on reconsideration the information on which it now relies to show the timeliness of the initial protest.

NDC also argues that it could not file its protest until it received the written explanation of the agency's decision to deny the protest. We disagree. Our view is well-settled that once the contracting agency proceeds with bid opening,

^{1/} The contracting officer denies this allegation.

the protester is on notice that the agency will not undertake the requested corrective action. York Int'l Corp., B-234895, supra. In fact, section 21.0(f) of our Regulations specifically identifies bid opening as one type of adverse agency action. Thus, a protester may not simply wait for the agency's formal response before filing its protest. BST Sys., Inc.--Request for Reconsideration, B-218628.2, June 11, 1985, 85-1 CPD ¶ 670.

Since NDC has shown no errors of fact or law which warrant reconsideration, the request for reconsideration is denied.


James F. Hinchman
General Counsel